Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of<br><br>Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996 | CC Docket No. 96-146 |
| In the Matter of<br><br>Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act | CC Docket No. 93-22 |



## COMMENTS

### I. SUMMARY

These comments address the proposed redefinition of pay-per-call services and specifically, that portion of the proposed rule change which states:

> . . . [W]e tentatively conclude that when a common carrier charges a telephone subscriber for a call to an interstate information service, any form of renumeration from that carrier to an entity providing or advertising the service, or any reciprocal arrangement between such entities, constitutes per se evidence that the charged levy actually exceeds the charge for transmission. Accordingly, interstate services provided through such arrangements but fit within the pay-per-call definition and, thus, be required to be offered exclusively through 900 numbers.

The proposed rule change is seriously flawed as it is:

1. Well beyond the authority of the FCC and therefore illegal;
2. Anti-competitive;
3. Overbroad and unduly restrictive; and

4. Violative of the First Amendment to the U.S. Constitution insofar as it represents an unreasonable restriction on content.

HFT, LO-AD Communications, Corp. and American International Communications, Inc. are companies which provide information services, including such services as anti-discrimination hotlines, aids information lines and teleconferencing. Each fear that they and the services they provide at reasonable and customary long distance charges will be prevented from reaching the broadest possible markets resulting in: 1) increased dominance by the major common carriers; 2) an inhibition in the growth of diverse services offered to the general public; 3) an increase in prices to consumers for the same services; and 4) an unprecedented chilling effect on the First Amendment right of free speech and association. For these reasons, all believe that the FCC should abandon its proposed rule change.

## II. THE PROPOSED RULE CHANGE IS VOID AS BEYOND THE AUTHORITY OF THE FCC

In the first paragraph of its order and notice of proposed rule making, the FCC states:

> . . . we are amending our pay-per-call regulations to comply with the statutory mandate that our rules reflect the new requirements of section 228 of the Communications Act.

This statement accurately reflects the "mandate" under which the FCC operates; i.e., to effectuate, not alter or broaden, the statutory guidelines enumerated by Congress. In this specific instance, the FCC boldly and broadly exceeds this mandate by seeking to completely redefine what Congress has already unambiguously defined. In so doing, the FCC cites no credible authority for exceeding its statutory mandate.

In paragraph 47 of its order and notice of proposed rule making, the FCC acknowledges and correctly cites Congress' intent in repealing the tariffed services exemption to pay-per-call status. The FCC states:

> Congress specifically sought to end service arrangements in which telephone subscribers are **charged high prices** for transmission of calls to ostensively free information services. (Emphasis added.)

The FCC was no doubt relying on Congress' decision to include in the definition of pay-per-call services the requirement that a caller pay a per call or per time interval charge that is greater than, or in addition to, the charge for transmission of the call. (See §228(i)(1)(B).)[1] In direct contrast to Congress' wishes in that regard, the FCC, relying on section 4(i) of the Communications Act, proposes to deem all "information services", even those provided at reasonable and customary long distance rates, "pay-per-call services" where the provider of the information service receives "any form of renumeration".

As the FCC well knows, section 4(i) in inadequate authority for the drastic proposed rule change which usurps rather than implements the mandate to the FCC to carry out the objectives

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[1]Nowhere does the FCC contend that this section is vague or ambiguous. Such a contention would be frivolous given its clarity.

of the Communications Act, and substitutes its judgment for Congress rather than supporting it. Precedent abounds for the proposition that the Commission's authority to propose and implement rules requires a specific statutory basis rather than any general inherent equity power. (FCC v. RCA Communications, Inc., 346 U.S. 86, 73 Supreme Ct. 998 (1953); United States v. Scrap, 412 U.S. 699, 93 Supreme Ct. 1204 (1973); and AT&T v. FCC, 487 F.2d 865, (2d Cir. 1988).) As one court held, the FCC may not rewrite a "statutory scheme" enacted by Congress on the basis of its own interpretation of the equities of a particular situation. (MCI v. FCC, 765 F.2d 1186, 1195 (D.C. Cir. 1985).) Therefore, without some specific statutory authority to redefine what Congress has already unambiguously defined, the proposed rule change must be abandoned.

## III. THE PROPOSED RULE CHANGE IS ANTI-COMPETITIVE AND PRO-MONOPOLISTIC

The clear intent of the proposed rule change is to relegate all interstate "information" telephone transmissions to 900 service. It is undisputed that 900 services are already seriously dominated by AT&T. By forcing all information based transmissions to the 900 service arena, AT&T's dominance is magnified and promoted. This is precisely the ill that deregulation sought to cure.

Moreover, 900 service lacks portability, a characteristic which is essential to insure access to all regional markets and thus promote rather than inhibit competition. It is well known that providers of information services rely heavily on customer loyalty to particular phone numbers through advertising. Without portability, movement throughout the regional markets is eliminated and competition suffers. Ultimately, the consumer suffers as a result of the lack of options for the services they seek.

It would truly by a shame to solidify AT&T's effective monopoly in the 900 service arena by forbidding competitors to have access to the same markets where these competitors can offer their services at the reasonable and customary long distance rates charged by the likes of AT&T.

## IV. THE PROPOSED RULE CHANGE IS OVERBROAD AND UNDULY RESTRICTIVE

Modifying the definition of pay-per-call to include telecommunications services provided at reasonable and customary long distance rates without charging the subscriber any premium whatsoever unreasonably restricts access to these services by the general public in a number of ways.

It is universally accepted that 900 access is more expensive to the subscriber because of the tremendous bad debt created by the non-deniable nature of the charge. Because of the tremendous bad debt write offs, the providers must charge more for their services, resulting in an otherwise unnecessary additional expense to the consumer. As an example, under the current rules and regulations, a given provider can transmit its service to a subscriber through MCI in the evening at ten cents per minute. MCI, by agreeing to share twenty percent of its reasonable and customary charge for transmitting the call with the provider affords the provider the opportunity to service the subscriber at the customary long distance rate while at the same time realizing a profit. The deniability of the charge encourages financial responsibility on the part of the subscriber and results in far less bad debt. In the 900 realm, common carriers charge a premium for transporting 900 calls of approximately thirty-three cents per minute plus an additional ten percent for collection.[2] Assuming a bad debt write off of fifty percent, which is not unusual in the industry, in order to offset the cost of providing the service, the provider of the service would have to charge the subscriber approximately eighty-six cents per minute, almost nine times the normal long distance rate.

Additional market restrictions include the inability of the general public to access 900 service from pay phones. As a consequence, those who cannot afford or who do not wish to have their own phones are denied access to the services altogether. The inability to access these services from a pay phone also eliminates caller anonymity as caller identity is revealed as a matter of course in a 900 call. Service through 900 is also unavailable at most hotels, businesses and car phones, further restricting market access. Moreover, 900 numbers are inaccessible to callers from out of the country. This not only deprives foreign consumers access to the services, it prevents domestic providers from capitalizing on

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[2]MCI recently increased its collection charge from twelve cents per call to thirty-five cents per call!

the international market. This prohibits smaller U.S. carriers from capitalizing on nitch markets in overseas territories that are still monopolistic or otherwise lagging far behind the U.S. telecommunications markets in deregulation. Moreover, it restricts domestic providers from creating additional demand for U.S. goods and services in these international markets, especially as it relates to the promotion of tourism, software products and telecommunications equipment.

The overbreadth of the proposed rule change is further demonstrated by the way in which the proposed change would inhibit innovative methods to generate traffic and fully utilize the communications network. Under the proposed scheme, many of the current mechanisms for providing information based services at reasonable and customary long distance rates would be prohibited. For instance, AT&T provides a service entitled Terminating Switch Access Arrangements (TSAAs) whereby AT&T makes payments to entities that receive large volumes of calls over AT&T's network if the entity connects to AT&T through its dedicated access. Under the scheme, AT&T compensates the entity by paying it a percentage of the transmission charge for terminating the call. As AT&T is able to avoid the much higher terminating charge often imposed by the local exchange carrier, the subscriber entity enjoys a net reduction in its monthly phone charges, and the consumer benefits from the savings. These TSAAs are widely utilized by hospitals, educational institutions, airlines, financial institutions and other large organizations which routinely provide recorded and live information services over the phone. Although everybody benefits from this and similar types of arrangements, they would be illegal under the proposed scheme.

Perhaps the most serious overbreadth concern is the equating of "information services" with "pay-per-call services". Clearly, the two are not the same. Section 228(i) makes it clear that it is not the providing information service itself that Congress opposed. Instead, it was the unexpected charges imposed for those services as a consequence of the deceptive practices by unscrupulous providers that Congress sought to prevent. Clearly, the purpose of section 228(i) is to put the kibosh on the unscrupulous billing practices and not to prohibit the dissemination of information services. The FCC would be hard pressed to identify anywhere in the Act where Congress seeks to equate information services with pay-per-call. By redefining pay-per-call to include the presumption described in paragraph 48 of its proposed rule change, the FCC broadly paints all information services as pay-per-call, something that Congress obviously never intended.[3]

## V. THE PROPOSED RULE CHANGE IS AN UNCONSTITUTIONAL CONTENT BASED RESTRICTION

The redefinition of pay-per-call is, in addition, an impermissible violation of First Amendment Rights insofar as it is,

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[3]The proposed rule would, for instance, outlaw a bank's "mortgage information hotline" if the bank were receiving any volume discounts or payments under a TSAA or similar agreement as described in section IV above.

in actuality, an attempt to improperly regulate content. Since all long distance calls are subject to disconnect for failure to pay, relegating "information service" calls which are billed at the same reasonable customary long distance rates as non-information service calls to 900 service is a transparent attempt to regulate the content of the calls being made. The Commission in effect wants to discourage providers from transporting "objectionable" material with the threat of non-deniability. The limited ability to collect payment for the service provided is an effective way to regulate and in fact eliminate the transporting of content the FCC deems undesirable. As the FCC well knows, the First Amendment ". . . does not countenance governmental control over the content of messages expressed by private individuals." (Turner Broadcasting Systems v. FCC, 114 Supreme Ct. 2445 (1994).)

The FCC knows that information providers cannot offer their services at the reasonable and customary long distance rates without accepting some form of renumeration from the carrier. Thus, although the consumer is paying no more for the service, it is branded with the pay-per-call label and penalized with the non-deniability hurdle to collection. Unable to have equal access to the much cheaper transmission service, the content is in effect being regulated out of the more competitive markets domestically and completely out of the international markets.

## VI. THE ALTERNATIVE

The redefinition of pay-per-call as suggested by the FCC becomes even more suspect when you consider the more rational alternative to accomplishing the goal of eliminating the "unexpected charges" as a consequence of "unscrupulous billing practices". If the FCC adopted guidelines requiring disclosures in all advertising for the services being offered notifying the proposed user that he or she would be charged normal and/or customary long distance rates for the call, and no more, the consumers "expectation" would be identical to the reality. Add to this a rule requiring that the services may only be provided at reasonable and customary long distance rates prevailing in the market will eliminate price gouging and would, in fact, encourage competition and increased network usage resulting, ultimately, in lower prices to the consumers.

HFT, LO-AD and American International implore the FCC to resist the impulse to implement rules which inhibit growth and competition and instead focus on alternatives which both protect the consumer and encourage broad use and access to the national and international telecommunications markets.

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